82-1942

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. HOFFMAN,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

1. To establish a claim of ineffective assistance of counsel on the ground of conflict of interest, do the Sixth and Fourteenth Amendments require a defendant to show more than that his attorney also actively represented before and at trial two co-defendants who pleaded guilty and testified as prosecution witnesses against him.

2. Do the Fifth and Sixth Amendments permit a prosecutor in closing argument to "impeach" the defendant's credibility by commenting on the fact that his attorney also represented two co-defendants who pleaded guilty and testified against the defendants as prosecution witnesses.

3. May a defendant be deemed to have knowingly and intelligently waived his Sixth and Fourteenth Amendment right to conflict-free counsel where he neither was informed that an actual conflict did in fact exist nor was apprised of any of the specific dangers of joint representation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	6
I. IN HOLDING THAT CUYLER v. SULLIVAN REQUIRES A DEFENDANT TO SATISFY A TWO-PART TEST TO ESTABLISH A SIXTH AMENDMENT VIOLATION, THE DECISION BELOW CONFLICTS WITH HOLDINGS BY FOUR FEDERAL COURTS OF APPEALS AND THREE STATE SUPREME COURTS	7
II. THE DECISION BELOW DISREGARDS THE SIGNIFICANT PENALTY IMPOSED ON PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL BY THE PROSECUTOR'S CLOSING ARGUMENT	11
III. THE DECISION BELOW THAT PETITIONER WAIVED HIS RIGHT TO CONFLICT-FREE COUNSEL IS CONTRARY TO THE STANDARD SET BY THIS COURT AND CONSISTENTLY APPLIED BY THE FEDERAL COURTS	14
CONCLUSION	17
APPENDICES	
A. Order of Supreme Court of South Carolina	1a
B. Opinion and Order of the South Carolina Court of General Sessions, County of Georgetown	3a
C. Transcript of October 15, 1979 *In Camera* Conference	10a

TABLE OF AUTHORITIES

Cases Page

Baty v. *Balkcom*, 661 F.2d 391 (5th Cir. 1981), *cert. denied*, 456 U.S. 1011 (1982) 8, 9
Brewer v. *Williams*, 430 U.S. 387 (1977) 14
Brien v. *United States*, 695 F.2d 10 (1st Cir. 1982) 8
Camera v. *Fogg*, 658 F.2d 80 (2d Cir.), *cert. denied*, 454 U.S. 1129 (1981) 8, 16
Commonwealth v. *Hodge*, 434 N.E.2d 1246 (Mass. 1982) 8, 10
Cuyler v. *Sullivan*, 446 U.S. 335 (1980) ..... *passim*
Donnelly v. *DeChristoforo*, 416 U.S. 637 (1974) 13
Glasser v. *United States*, 315 U.S. 60 (1942) 14
Gonzales v. *State*, 605 S.W.2d 278 (Tex. Crim. App. 1980) 10
Griffin v. *California*, 380 U.S. 609 (1965) 7, 12
Holloway v. *Arkansas*, 435 U.S. 475 (1978) 7, 8
Honneus v. *United States*, 509 F. Supp. 1135 (D. Miss. 1981) 9
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 14, 15
Miranda v. *Arizona*, 384 U.S. 436 (1966) 14
Parker v. *Parrott*, 662 F.2d 479 (8th Cir. 1981), *cert. denied*, 103 S.Ct. 102 (1982) 9
People v. *Castro*, 657 P.2d 932 (Colo. 1983) 9
Smith v. *Bordenkircher*, 671 F.2d 986 (6th Cir.), *cert. denied*, 103 S.Ct. 107 (1982) 10
State v. *Fenel*, 325 N.W.2d 703 (Wisc. 1982) 9
State v. *Franklin*, 400 So.2d 616 (La. 1981) 9
State v. *Pope*, 318 N.W.2d 883 (1982) 10
United States v. *Curcio*, 680 F.2d 881 (2d Cir. 1982) 15, 16
United States v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978) 16
United States v. *Flanagan*, 527 F. Supp. 902 (E.D. Pa. 1981), *aff'd*, 679 F.2d 1072 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3508 (January 11, 1983) 16
United States v. *Garafola*, 428 F. Supp. 620 (D.N.J. 1977) 15

TABLE OF AUTHORITIES—Continued

Page

United States v. *Garcia*, 517 F.2d 272 (5th Cir. 1975) 16
United States v. *Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) 13
United States v. *Harris*, 701 F.2d 1095 (4th Cir. 1983) 10
United States v. *Hearst*, 638 F.2d 1190 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981) 10
United States v. *Laura*, 667 F.2d 365 (3d Cir. 1981) 10, 16
United States v. *Lawriw*, 568 F.2d 98 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978) 15
United States v. *Mahar*, 550 F.2d 1005 (5th Cir. 1972) 15
United States v. *Mers*, 701 F.2d 1321 (11th Cir. 1983) 9
United States v. *Ramsey*, 661 F.2d 1013 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982) 11
United States v. *Tonaldi*, 537 F. Supp. 1229 (E.D. Ill. 1982) 16
United States v. *Waldman*, 579 F.2d 649 (1st Cir. 1978) 15
United States v. *Zajac*, 677 F.2d 61 (11th Cir. May 24, 1982) 16
United States ex rel. Williams v. *Franzen*, 687 F.2d 944 (7th Cir. 1982) 10

Constitutional Provisions

United States Constitution, Sixth Amendment .....*passim*

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STATE OF SOUTH CAROLINA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in this case on March 30, 1983.

OPINIONS BELOW

The opinion of the Supreme Court is unreported. It is reproduced in Appendix A. The opinion and order of the Court of General Sessions, County of Georgetown, is unreported and is reproduced in Appendix B.

JURISDICTION

The judgment of the Supreme Court was entered March 30, 1983. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

On May 11, 1979, Johnny Eugene Hamilton killed Roy Lowry. In September 1979, a Horry County, South Carolina grand jury indicted Hamilton for murder and George F. Moose, Bill Bryant and Kathy Danielson as co-conspirators and accessories. Petitioner John R. Hoffman, president of Coastal Gas and Appliance Company of Myrtle Beach, South Carolina, was indicted as an accessory before the fact of murder. The indictment alleged in pertinent part that he "did . . . procure through his agents . . . George F. Moose and/or Bill Bryant, a hired gunman, namely Johnny Eugene Hamilton, to murder Roy Lowry."

George F. Moose is petitioner's brother-in-law. When Moose was arrested in June 1979, petitioner contacted former county solicitor, Mr. J. M. "Bud" Long, and explained that he wished to retain a lawyer for Moose, who could not afford counsel himself. Long agreed to represent Moose for $15,000, which petitioner paid. When the police subsequently interviewed petitioner in July 1979, he asked Long to represent him as well. Long agreed for an additional fee of $15,000.

Shortly thereafter, on August 17, a warrant was issued for petitioner's arrest. The following day—at a time when he was representing both petitioner and Moose—

Long negotiated a plea agreement on behalf of Moose alone which obligated Moose to testify against petitioner at trial. Pursuant to the agreement and at Long's direction, Moose made a statement that implicated himself and petitioner. Long continued to represent both petitioner and Moose and, indeed, even agreed to represent a third defendant, Kathy Danielson.

When the case was called for trial on October 15, 1979, Long alone represented petitioner, Moose, and Danielson. At the commencement of the trial, the court questioned these three individually and as a group to apprise them of their right to separate counsel. The court asked each defendant: whether he was satisfied with Long's representation; whether he understood the charges against him; whether he was aware that Long represented other defendants; whether he understood that his testimony might affect those defendants and their testimony might affect him; whether he understood that different verdicts might be reached and different sentences imposed as to each defendant; and whether he was satisfied for Long to continued to represent him. Petitioner, Moose, and Danielson answered "yes" to these questions. A. 11a-13a; 13a-16a; 16a-19a.

The court failed to advise petitioner that his attorney, Mr. Long, was confronted with a potential or actual conflict of interest. Accordingly, the court did not inform petitioner that he had a right to conflict-free counsel and did not suggest that it was seeking to elicit a waiver of that right. Indeed, when the court asked Long whether he had "anything to add," he observed that he could "see no possibility of a conflict with any of them," A. 21a-22a, and the court concluded that "no conflict exist[s]." A. 22a. This first trial ended in its earliest stages in a mistrial.

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[1] References herein to "A." are to the Appendix to the Petition; references to "TR." are to the Transcript of Record filed in the South Carolina Supreme Court.

At the outset of the new trial, the court again held an in camera hearing and inquired of petitioner, Moose, and Danielson whether they recalled the questions asked them at the time of the first trial and whether they wished to continue with Long as their attorney. Each answered affirmatively. In open court, the trial judge then accepted the guilty pleas of Moose and Danielson. The Solicitor noted on the record that Moose's plea was the product of negotiation and that "he would have been charged with something greater except for the fact that the state had to have him as a witness in the case before the bar." TR. 282-83. Moose, the Solicitor explained, was the "final link in the chain." TR. 284.

Moose indeed proved to be the state's key witness against petitioner. He testified that in looking for a hired killer because "somebody had raped my sister"; that he acted, not on his own initiative, but at petitioner's instigation. He stated that petitioner had first proposed the idea and later encouraged him to continue the search for a trigger man. Petitioner took the stand and testified that Moose, in a rage, had first offered to kill Lowry himself. He explained that, after initially encouraging Moose to look for someone, he took back his money and told Moose that the plan was off. Moose, he said, never called to ask if the "deal" was on. He learned of the murder only when Moose demanded payment, saying that they would be the murderer's next victims if he was not paid.

Long, who examined all the other prosecution witnesses but two, did not cross-examine Moose. Instead, Moose was examined by William Doar, a local state legislator, who had been requested by Long to assist him in the selection of a jury in Georgetown County, the venue for the new trial. At no time prior to trial did Doar ever meet or discuss the facts of the case with petitioner.

Throughout the trial, the Solicitor made pointed reference to Long's joint representation of Moose and Daniel-

son as well as petitioner. In his direct examination of both Moose and Danielson, the Solicitor underscored that Long was their attorney and, as to Moose, that Long was his attorney "at the time that deal . . . was made . . . for your testimony in solving the case." Tr. 674. The Solicitor hammered home the point in his closing argument

> I am going to hit the highlights with you. Let's talk about . . . when this thing first happened. *No questions but that Moose, his own brother-in-law, who is, by the way, represented by Mr. Long, too, you will remember. He represented Moose too. That was his client on the stand, Moose, as well as his client, John Hoffman.* What did Moose tell you when he got on the stand? He . . . said Johnny told him, "I have got a man I need to get rid of." And he started making arrangements right then. TR. 1463-64 (emphasis added).
>
> * * * *
>
> [N]ow what did Moose say about that. . . . "I gave it back to Hoffman and told him I would keep looking." *That's his brother-in-law, and he is Bud Long's client and he is that woman's brother, whose husband is on trial here and his own brother-in-law and Bud Long's own client,* said that he told him he would keep looking, which he did and then he called him from Al's Marina later . . . and they had found somebody. . . . They found somebody who goes by the name of Bear. All right. TR. 1477 (emphasis added).

The jury returned a verdict of guilty as to petitioner and sentenced him to life imprisonment. Petitioner filed a timely motion for new trial on the grounds that his attorney had labored under an actual conflict of interest, that the conflict had not been waived, and that the Solicitor's comments on the conflict had independently prejudiced his Sixth Amendment right to counsel. On December 4, 1981, almost two years later, the trial court denied the motion. Citing *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), the trial court noted that "the possibility of conflict is insufficient to impugn a criminal conviction

unless an actual conflict adversely affecting the trial attorney's performance can be shown." A. 8a. The trial court did not dispute that Long labored under an actual conflict of interest, but held nevertheless that relief was not warranted because petitioner "has failed to show that the asserted conflict of interest impaired his defense." *Ibid.* Moreover, the court held, petitioner waived any conflict of interest because he "knew he could obtain separate counsel on request." A. 9a.

Petitioner filed a timely notice of appeal from his conviction of December 15, 1981. On March 30, 1983, the Supreme Court affirmed the judgment of conviction without a full written opinion.

REASONS FOR GRANTING THE WRIT

This case presents three substantial constitutional issues arising out of an attorney's representation of co-defendants with conflicting interests:

1. Petitioner's attorney jointly represented two co-defendants who pleaded guilty and testified against petitioner at trial. These simple facts provide a convenient vehicle to resolve the serious split among the federal courts of appeals and among state supreme courts regarding the test articulated by *Cuyler* v. *Sullivan.* If an attorney actively represents defendants with conflicting interests, does *Cuyler* require more to impugn a criminal conviction?

2. On direct examination of one co-defendant, the Solicitor elicited that he continued to be represented by petitioner's attorney, who had negotiated the co-defendant's guilty plea in return for his testimony. In summation, the Solicitor then sought to impeach petitioner's testimony by arguing that he was represented by the same attorney who had negotiated the co-defendants' guilty pleas. Such prosecutorial comment is as serious a constitutional infringement on the Sixth Amendment right

to counsel as was the comment in *Griffin* v. *California* on the Fifth Amendment right against self-incrimination.

3. The trial court found that petitioner waived any conflict of interest simply because he was informed of his right to have separate counsel. The record reveals that the court never informed petitioner that his counsel's joint representation might or did in fact entail a conflict of interest and never advised him of the dangers caused by a conflict. On these facts, the finding of waiver cannot be reconciled with the holdings of this Court that a waiver must be knowing and intelligent.

I. IN HOLDING THAT CUYLER v. SULLIVAN REQUIRES A DEFENDANT TO SATISFY A TWO-PART TEST TO ESTABLISH A SIXTH AMENDMENT VIOLATION, THE DECISION BELOW CONFLICTS WITH HOLDINGS BY FOUR FEDERAL COURTS OF APPEALS AND THREE STATE SUPREME COURTS.

In *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), this Court resolved two important questions left open in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). One question was "whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel." 446 U.S. at 345. The Court answered that question negatively. It concluded rather that a Sixth Amendment violation is established only when the defendant demonstrates "that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348. The Court was quick to clarify that the defendant need not prove prejudice. "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.* at 349-350. "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 350.

In the short three years since this Court decided *Cuyler* v. *Sullivan*, there has been a widening split of authority as to how the test set forth in the opinion is to be applied. Does proof of an actual conflict of interest warrant a presumption of prejudice? Or must a defendant demonstrate, not only that his attorney represented conflicting interests, but also that there was some discernible adverse effect on the attorney's performance? Does *Cuyler* v. *Sullivan* create a test with two components or one?

The Fifth Circuit's answer was one. In an opinion by Judge Frank M. Johnson, Jr., the Fifth Circuit early took the view that "the Court intended any active representation of interests that actually conflict to violate its standard." *Baty* v. *Balkcom*, 661 F.2d 391 (5th Cir. 1981), *cert. denied*, 456 U.S. 1011 (1982). If the standard required a separate and additional showing of adverse effect, the Fifth Circuit reasoned, *Cuyler* would conflict with *Holloway* v. *Arkansas*, for there this Court explained that, because the harm from a conflict lies in what the lawyer *refrains* from doing, "it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client." 435 U.S. at 490-91. Accordingly, in *Baty* v. *Balkcom*, where, had either of the jointly represented defendants testified, he would have implicated his co-defendant while exonerating himself, the court found an actual conflict and, thus, a Sixth Amendment violation. The conviction was reversed and remanded.

The First and Second Circuits have also focused on the question whether an actual conflict exists. *Brien* v. *United States*, 695 F.2d 10 (1st Cir. 1982); *Camera* v. *Fogg*, 658 F.2d 80 (2d Cir.), *cert. denied*, 454 U.S. 1129 (1981). What decides that question, the First Circuit said, is whether there was some "plausible alternative defense strategy or tactic" which the defense attorney might have pursued but which was "inherently in conflict with [his] other loyalties or interests." *Id.* at 15. The *Brien* court cited the district court opinion in *Hon-*

neus v. *United States*, 509 F. Supp. 1135, 1139 (D. Miss. 1981), which concluded that under *Cuyler* v. *Sullivan* "[l]ooking for 'actual conflict' would be the same as finding 'adverse effect.' "

Only two months ago, the Court of Appeals for the Eleventh Circuit, too, adopted the single component interpretation, holding that the *Cuyler* v. *Sullivan* standard is met by " 'proof of an actual conflict of interest.' " *United States* v. *Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983), *quoting Baty* v. *Balkcom*, *supra*. Such a conflict exists, the court said, where co-defendants have inconsistent interests and the attorney makes a choice between them. If he does not choose, then the conflict remains hypothetical.

The decision below conflicts, not only with these cases in the federal courts of appeals, but with decisions by three state supreme courts. In *People* v. *Castro*, 657 P.2d 932 (Colo. 1983), the defendant contended that his attorney's simultaneous representation of the district attorney in separate litigation created a conflict that denied him effective assistance of counsel. The Colorado Supreme Court, citing *Cuyler*, defined the issue solely as "whether the defense attorney's simultaneous representation of the district attorney . . . constituted an actual conflict of interest." The Supreme Court of Louisiana, and Wisconsin have given the same interpretation to *Cuyler*. *See State* v. *Franklin*, 400 So.2d 616 (La. 1981); *State* v. *Fenel*, 325 N.W.2d 703 (Wisc. 1982).

The lower court, as summarily affirmed by the South Carolina Supreme Court, however, held that it was not enough for petitioner to establish that his attorney had an actual, not merely hypothetical, conflict of interest. The court thus aligned itself with three state supreme courts—Nebraska, Massachusetts, and Texas—and the Courts of Appeals for the Third, Sixth, Seventh, Eighth and Ninth Circuits. Typical of those decisions is *Parker* v. *Parrott*, 662 F.2d 479, 483-84 (8th Cir. 1981) *cert. denied*, 103 S.Ct. 102 (1982), where in reliance on *Cuyler*

the court concluded: "Therefore, a *two-step test* must be met in a case of multiple representation of conflicting interests. A claimant must establish: (1) actual conflict of interest; and (2) adverse effect on the lawyer's representation." (Emphasis added.) *Accord, United States ex rel. Williams* v. *Franzen*, 687 F.2d 944 (7th Cir. 1982); *Smith* v. *Bordenkircher*, 671 F.2d 986 (6th Cir.) *cert. denied*, 103 S.Ct. 107 (1982); *United States* v. *Laura*, 667 F.2d 365 (3d Cir. 1981); *Commonwealth* v. *Hodge*, 434 N.E.2d 1246 (Mass. 1982);[2] *State* v. *Pope*, 318 N.W.2d 883 (1982); *Gonzales* v. *State*, 605 S.W.2d 278 (Tex. Crim. App. 1980). The Ninth Circuit, although not expressly adopting a two-part analysis, has nonetheless construed the test solely in terms of adverse effect. "We read *Sullivan* to define an actual, as opposed to potential, conflict as one which in fact adversely affects the lawyer's performance." *United States* v. *Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981).

The lineup of decisions on the interpretation of *Cuyler* v. *Sullivan* therefore is as follows:[3]

Actual Conflict	Actual Conflict Plus Adverse Effect
First Circuit	Third Circuit
Second Circuit	Sixth Circuit
Fifth Circuit	Seventh Circuit
Eleventh Circuit	Eighth Circuit
Colorado	Ninth Circuit
Louisiana	Massachusetts
Wisconsin	Nebraska
	Texas

[2] Interpreting *Cuyler* to require a showing of adverse effect in addition to actual conflict, the court in *Hodge* held that the Massachusetts Declaration of Rights provided a greater safeguard: "[H]aving established a genuine conflict of interest, Hodge was required to prove neither actual prejudice nor adverse effect on his trial counsel's performance to entitle him to a new trial under art. 12." 434 N.E.2d at 1249.

[3] The Fourth Circuit has taken conflicting positions. *Compare United States* v. *Harris*, 701 F.2d 1095, 1099 (4th Cir. 1983) (two-

This conflict among the jurisdictions is current as well as clear-cut. While *Cuyler* v. *Sullivan* clarified two aspects of the problem of evaluating conflicts of interests, the opinion itself gave rise to an ambiguity, as the split in the cases reflects. This case presents an appropriate vehicle to resolve the matter.

II. THE DECISION BELOW DISREGARDS THE SIGNIFICANT PENALTY IMPOSED ON PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL BY THE PROSECUTOR'S CLOSING ARGUMENT.

This case also presents in sharply defined terms a novel and important constitutional issue. May the prosecutor point out and comment on defense counsel's conflict of interest in order to challenge the credibility of the defendant on the central question in the case?

Here, the state solicitor made no effort to disguise his argument. He compared the conflicting testimony of petitioner and Moose and then asked the jury to remember that attorney Long represented both men: "No question but that Moose . . . who is . . . represented by Mr. Long, too, you will remember. He represented Moose, too. That was his client on the stand, Moose, as well as his client, John Hoffman." TR. 1463-64. It was an argument for which the solicitor had methodically laid the groundwork in his direct examination of Moose. His final two questions to Moose had been:

> (1) Q: Who was your lawyer at the time the deal or concession was made for exchange for your testimony in solving the case?
>
> A: Mr. Long has been my attorney since I have been down here.

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part test), *with United States* v. *Ramsey*, 661 F.2d 1013, 1018 (4th Cir. 1981) ("[I]f an actual conflict of interest is present, constitutional error has occurred. . . ."), *cert. denied*, 455 U.S. 1005 (1982).

(2) Q: And Mr. Long is still your attorney?

A: Yes, sir. TR. 674.

With these questions, the solicitor early on in the trial invited the jury to weigh petitioner's credibility in light of the fact that Long represented Moose, for whom Long had negotiated a guilty plea. What was implicit in his examination of Moose became explicit in summation. Referring to Moose's testimony inculpating petitioner, the solicitor said: "That's [petitioner's] brother-in-law, and *he is Bud Long's client* and he is [petitioner's wife's] brother, whose husband is on trial here and his own brother-in-law and *Bud Long's own client*, said he told [petitioner] he would keep looking, which he did . . . ." TR. 1477 (emphasis added). Whether Moose said he would keep looking was the key point—petitioner's defense turned on whether the jury would believe Moose or him.

The failure of the court below to recognize the constitutional error created by the solicitor's closing argument is in conflict with the sense and spirit of *Griffin* v. *California*, 380 U.S. 609 (1965). There, this Court held that prosecutorial comment on the defendant's refusal to testify "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614. The simple logic of *Griffin* applies with equal force to prosecutorial comment on a defendant's exercise of his right to counsel. Just as the defendant's silence may not be used against him, his selection of counsel may not be used as evidence that he is guilty. That, however, is precisely what the solicitor did here. He argued that the jury should disbelieve petitioner because his attorney also represented a co-defendant who had pleaded guilty and whose testimony conflicted with that of petitioner. The inference is one that the jury might have drawn for itself. But that possibility does not diminish the constitutional error. As the Court explained in *Griffin* v. *California*, "What the jury

may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused with evidence against him is quite another." *Ibid.*

We are aware of only one case in which this issue has been addressed. In *United States* v. *Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), during the interrogation of two corporate executives before the grand jury, the prosecutors made reference to the fact that the corporation had employed a law firm with a "nationwide reputation as defense lawyers in criminal cases." *Id.* at 1352. These comments, the court said, "plainly suggested that [the corporation], its executives and employees believed themselves guilty of crimes; and for that reason the particular law firm was employed." *Ibid.* The court held that "it is basically unfair for a prosecutor to urge against a person the time and circumstances of his retention of an attorney." *Ibid.* The comments here were all the more unfair, for the solicitor urged against petitioner before a *petit jury* the fact of his attorney's *conflict of interest.* It can be said here that "the prosecutor's remarks so prejudiced a specific right . . . as to amount to a denial of that right." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974).

In *Cuyler* v. *Sullivan*, the court reflected that "[de]fense counsel have an ethical obligation to avoid conflicting representations. . . ." 446 U.S. at 346. Yet, since that decision, conflict of interest cases continue to flood the courts. Whenever counsel represents co-defendants with conflicting interests, the temptation is present for the prosecutor to use the fact of that conflict as a weapon. The Court should resolve whether a prosecutor, as here, may give in to that temptation.

III. THE DECISION BELOW THAT PETITIONER WAIVED HIS RIGHT TO CONFLICT-FREE COUNSEL IS CONTRARY TO THE STANDARD SET BY THIS COURT AND CONSISTENTLY APPLIED BY THE FEDERAL COURTS.

There is no uncertainty about what test applies to the waiver of fundamental rights. The state may establish a waiver only by proving "an intentional relinquishment or abandonment" of the right. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977). This stiff test is meant to set "high standards of proof for the waiver of constitutional rights." *Miranda* v. *Arizona*, 383 U.S. 436, 475 (1966). Indeed, as the Court emphasized in its first major decision to deal with conflicts of interest, "[t]o preserve the protection of the Bill of Rights for hard-pressed defendants, [the courts] indulge every reasonable presumption against the waiver of fundamental rights." *Glasser* v. *United States*, 315 U.S. 60, 70 (1942).

In holding that petitioner waived his right to conflict-free counsel, the court below made a mockery of the *Johnson* v. *Zerbst* standard. It held that it was sufficient merely to advise petitioner that he had a right to separate counsel.[4] To waive a right knowingly, however, the defendant must be aware that the right exists; to waive it intelligently, he must be aware of the dangers which the right protects against. Thus, for example, when the privilege against self-incrimination is at stake, the defendant must be warned, not only "that he has the right to remain silent," but also "that anything he says can be used against him in a court of law." *Miranda* v. *Arizona*, 384 U.S. 436, 479 (1966). It follows that, to waive his right to conflict-free counsel, the defendant must know two

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[4] The court even suggested that a waiver could be inferred from the fact that "during the trial" petitioner did not indicate "that he desired separate counsel or that he was dissatisfied with his representation." A. 9a.

things: a conflict does in fact or may well exist and, in addition, what the dangers of such representation are.[5]

The federal courts, applying *Johnson* v. *Zerbst*, have consistently so held. In *United States* v. *Mahar*, 550 F.2d 1005 (5th Cir. 1972), the court held that there could be no waiver because the defendant "did not assert a desire to retain [his attorney] *despite a debilitating conflict.* Rather, [the defendant's] position was that [his attorney] did not suffer from such a conflict." (Emphasis added.) *Cf. United States* v. *Garafola*, 428 F. Supp. 620, 624 (D.N.J. 1977). Here, the record plainly reveals that petitioner was never advised that his attorney was subject to a serious conflict of interest. Indeed, the term "conflict of interest" was *never* used in questioning petitioner. Consequently, petitioner could not "knowingly" have waived his attorney's conflict of interest.

The body of authority ignored by the court below makes it equally clear that petitioner could not have "intelligently" waived his right to conflict-free counsel. In this area, waivers are particularly problematic. The danger inherent in multiple representation "make the contours of a knowing and intelligent waiver a good deal more complicated." *United States* v. *Curcio*, 680 F.2d 881 (2d Cir. 1982). The courts therefore have uniformly held that the defendant must be warned of the "*specific dangers* of joint representation." *United States* v. *Waldman*, 579 F.2d 649, 652 (1st Cir. 1978) (emphasis added), and "in as much detail as the court's experience and its knowledge of the case will permit." *United States* v. *Curcio*, *supra*, 680 F.2d at 888. The defendant must be told "the particular way in which defense conduct might differ if there were separate attorneys." *United States* v. *Lawriw*, 568 F.2d 98, 105 (8th Cir. 1977) *cert. denied*, 435 U.S.

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[5] In its brief to the Supreme Court of South Carolina, the state conceded that both elements are necessary to a valid waiver. Brief of Respondent, pp. 7-8. Petitioner was warned, however, neither of the fact of a conflict nor of the dangers of such a conflict.

969 (1978).[6] Moreover, the waiver should take the form of a narrative response rather than mere assent to a series of questions from the bench. *United States* v. *Garcia*, 517 F.2d 272, 278 (5th Cir. 1975); *United States* v. *Curcio*, 680 F.2d 881, 889 (2d Cir. 1982); *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978). In this case, however, the court did not advise petitioner of any specific dangers created by his attorney's conflict. The court merely explained certain features of a joint trial—that his co-defendants might testify against him at trial; that their testimony might affect him, and, likewise, his testimony might affect them; that different verdicts might be returned against each of the defendants; and that different sentences might be imposed. A. 13a-16a. These however, are features of a joint trial; they exist whether co-defendants are separately represented or not.

To alert a defendant to the dangers of multiple representation, the court must focus *on the lawyer* and how his performance might be affected by the conflict of interest. Here the trial court made no mention of how Long's representation of petitioner and co-defendants Moose and Danielson might affect Long's loyalties, his choice of

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[6] *See, e.g., United States* v. *Zajac*, 677 F.2d 61 (11th Cir. May 24, 1982) (where the magistrate advised the defendants of the potential areas of conflict and specifically identified a defense that would be foreclosed by joint representation); *United States* v. *Laura*, 667 F.2d 365, 371 (3rd Cir. 1981) (when "the Government noted the possible dangers involved in the joint representation"); *Camera* v. *Fogg*, 658 F.2d 80 (2d Cir. 1981) (where defense counsel did not explain to defendants "how their different interests might be affected by multiple representation"); *United States* v. *Tonaldi*, 537 F. Supp. 1229 (E.D. Ill. 1982) (where the trial court warned that if one codefendant testified against another "it would be difficult for one lawyer to fairly represent all defendants when that occurs"); *United States* v. *Flanagan*, 527 F. Supp. 902 (E.D. Pa. 1981), *aff'd*, 679 F.2d 1072 (3d Cir. 1982) (where, *inter alia*, the court explained that separate counsel, unlike joint counsel, could present alternative defenses), *cert. granted*, 51 U.S.L.W. 3508 (January 11, 1983).

strategy, his selection of witnesses, his vigor in cross-examination, his challenge to the credibility of key witnesses or his assignment of relative blame in argument. The trial court's finding of waiver and the Supreme Court's summary affirmance thus represent a substantial departure from the standard mandated by this Court. Accordingly, a writ of certiorari should issue to correct the error.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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May 31, 1983

APPENDIX A

Opinion and Judgment of the Supreme Court of South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

Respondent.

v.

JOHN R. HOFFMAN,

Appellant.

Appeal From Horry County
A. Lee Chandler, Judge

Memorandum Opinion No. 83-MO-57
Filed March 30, 1983

AFFIRMED

Robert L. Weinberg, Lawrence Lucchino and F. Lane Heard, III, of Williams & Connolly, all of Washington, D.C.; and Ronald J. Jebaily, of Jebaily & Glass, of Florence, for appellant.

Attorney General T. Travis Medlock, Retired Attorney General Daniel R. McLeod, Assistant Attorney General Harold M. Coombs, r., and Staff Attorney Carlisle Roberts, Jr., all of Columbia; and Solicitor James O. Dunn, of Conway, for respondent.

PER CURIAM: Appellant was convicted of being an accessory before the fact of murder and was sentenced to life imprisonment.

After careful consideration of the record and briefs, we are of the opinion that no error of law is present, and that a full written opinion would be without precedential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

/s/ J. Woodrow Lewis
C.J.

/s/ Bruce Littlejohn
A.J.

/s/ J. B. Ness
A.J.

/s/ George T. Gregory, Jr.
A.J.

/s/ David W. Harwell
A.J.

APPENDIX B

Opinion and Order of the South Carolina Court of General Sessions, County of Georgetown

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IN THE COURT OF GENERAL SESSIONS
STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

THE STATE

vs.

JOHN R. HOFFMAN, JR.,
Defendant.

ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL

THIS MATTER came before this Court by way of a Motion for New Trial marked "heard" by this Court on the 12th day of December, 1979 on behalf of the above-named Defendant, John R. Hoffman, Jr. The matter was heard before me on April 7, 1981 in my chambers at the Darlington County Courthouse in Darlington, South Carolina. Present at the hearing were Lawrence Lucchino, Esquire, and F. Lane Heard, Esquire, of the Washington, D.C. Bar and Ronld J. Jebaily, Esquire, of the Florence County Bar, appearing on behalf of the Defendant, John R. Hoffman. Appearing on behalf of the State of South Carolina were Jim Dunn, Esquire, Solicitor of the Fifteenth Judicial Circuit, and Lindy P. Funkhouser, Esquire, Assistant Attorney General. This Court heard arguments of counsel, introduced certain exhibits into evidence, and heard testimony and received affidavits in regards to the merits of the Defend-

ant's claim on the Motion for a New Trial. After the April 7, 1981 hearing this Court received additional affidavits from the Defendant's counsel and it has been agreed that the record is now sufficient for this Court to make its ruling. Pursuant to the foregoing findings of fact and conclusions of law, this Court rules that the Motion for a New Trial be denied.

STATEMENT OF THE CASE

The Defendant was indicted by a Georgetown County Grand Jury for the offense of accessory before the fact of murder during the September, 1979 term of General Sessions Court for Georgetown County. Also, during that term, codefendant George F. Moose was indicted for two counts of conspiracy to commit murder and accessory after the fact of murder; codefendant Kathy Danielson was indicted for the crime of accessory after the fact of murder and conspiracy to commit murder; codefendant Johnny Eugene Hamilton was indicted for the crimes of conspiracy to commit murder and murder; and codefendant Bill Bryant was charged with two counts of conspiracy to commit murder. The Solicitor elected to proceed with the case under the South Carolina Death Penalty Act since all defendants were alleged to have participated in a murder-for-hire scheme to kill a Mr. Roy Lowry in Georgetown County, South Carolina. See South Carolina Code § 16-3-20(C)(a)(4) (Cum. Supp. 1980). The case was called for trial before me at the Georgetown Court of General Sessions for the term beginning November 26, 1979 and a jury. At the time of trial the Defendant, John R. Hoffman, Jr., was represented by J. M. Long, Jr., Esquire, and William B. Doar, Esquire. Mr. Long also represented codefendants Moose and Danielson. On November 26, 1979 codefendants George Moose and Kathy Danielson pleaded guilty to the charges against them. They subsequently testified for the State in the ensuing trial of *State of South Carolina v. Johnny Eugene Hamilton and John R. Hoff-*

man. At the conclusion of the trial the jury found Defendant Hoffman guilty and he was sentenced to life imprisonment.

On October 15, 1979, prior to the Defendant's conviction and his codefendants' guilty pleas, this Court held an *in camera* hearing to determine whether separate counsel should be appointed for Hoffman, Moose and Danielson, since they were all being represented by J. M. Long, Jr., Esquire. At the *in camera* hearing this Court examined each defendant individually. This Court then examined the defendants together outside the presence of counsel and collectively in the presence of their counsel to apprise them of their right to competent and independent legal counsel and to determine whether, at any time, they desired to have separate counsel appointed on their behalf. After advising each codefendant of possible conflicts arising from joint representation in the case, each defendant indicated at all times that he or she was completely satisfied with Mr. Long's representation and that he or she did not wish to have appointed on their behalf separate counsel. At no time during the guilty pleas of his codefendants or during the trial did the Defendant Hoffman indicate that he desired separate counsel or that he was disastisfied with his representation.

In his Motion for a New Trial the Defendant Hoffman alleges the following grounds:

> (1) That the trial court erred in failing to instruct the jury that it must find beyond a reasonable doubt that he acted with malice aforethought in order to convict him as an accessory before the fact to murder;
>
> (2) That the trial court erred in failing to charge the jury on the offense of accessory before the fact to manslaughter;
>
> (3) That the trial court erred in excluding for cause prospective jurors who indicated they could not impose the death penalty under any circumstances;

(4) That he was prejudiced by the presence of the deceased's wife at the Solicitor's counsel table during the trial;

(5) That trial counsel acted under a conflict of interest by representation of multiple defendants which adversely affected his performance.

In overruling the aforementioned grounds for the Defendant's new trial, this Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I find that trial counsel made no objection to the presence of the deceased's wife, Mrs. Lowry. Furthermore, I find from my observations of her during the trial as she sat at the Solicitor's table that she frequently responded to inquiry from the Solicitor as to witnesses appearing on the stand. I further observed her making low voiced comments to the Solicitor on testimony being offered by witnesses and particularly involving matters in which the relationship of the Defendant Hoffman's family and the Lowry family would be put into testimony. I therefore find that her presence at the Solicitor's table was not for the purpose of creating sympathy, but, rather, to assist the Solicitor in the preparation and presentation of his case. At no time did Mrs. Lowry make a display of grief or emotional distress to the jury.

I find from my notes as to the questions asked of each codefendant at the October 15, 1979 *in camera* hearing and from my court reporter's affidavit, both of which are attached hereto and incorporated herein by reference as if set out verbatim, that the Defendant Hoffman was informed of and understood his right to appointment of competent counsel with interests independent of his codefendants, Moose and Danielson. I find he understood that his codefendants might plead guilty and testify against him in the case and that he could receive separate

counsel if he so desired. I further find from his answers while alone with me, while in the presence of his co-defendants and while in the presence of his codefendants and his counsel, that he knowingly and intelligently waived any potential conflicts of interest which may arise in the case. Further, I find from his conduct at trial that he knowingly and intelligently waived any right to separate counsel when his codefendants testified on behalf of the State. I find, contrary to the Defendant's contentions in his affidavits supporting his motion, that Mr. Long did not coerce the Defendant Hoffman or in any manner instruct him as to what he should say during the *in camera* hearing or at any other time. Finally, I find from my observation of Mr. Long's performance at trial that he was not in any way hampered by his professional relationship with the codefendants Moose and Danielson.

CONCLUSIONS OF LAW

I. *As to the Defendant's claim that the trial court erred in charging the elements of accessory before the fact to murder.*

On this issue the Defendant claims that the charge on accessory before the fact should have included a charge on malice. Reference to the charge will reveal that this Court properly charged the elements of the crime of accessory before the fact to the jury. *State v. Grueling*, 257 S.C. 515, 186 S.E. 2d 706 (1972). The crime of accessory before the fact does not include malice as an element to the offense, and the Defendant's contention on this issue is completely without merit.

II. *As to the Defendant's claim that this Court should have charged the jury on accessory before the fact to manslaughter.*

In this State, there is no accessory before the fact to manslaughter and a charge on that crime would not have

been warranted. *State v. Jennings*, 160 S.C. 348, 158 S.E. 687 (1931).

III. *As to the Defendant's claim of prejudice from exclusion for cause of prospective jurors who could not, under any circumstances, impose the death penalty.*

The Defendant's sentence of life imprisonment forecloses any claim of error on this issue. *State v. Owen*, Smith's Advance Sheets, Op. No. 21599, November 23, 1981.

IV. *As to the claim of prejudice from the presence of the deceased's wife at the Solicitor's table during trial.*

Failure to raise this issue at trial has waived any claim of error. 7A West's South Carolina Digest, *Criminal Law* Key Nos. 899 and 1028. In any event, this Court finds that the Defendant has made no showing of actual prejudice on this issue. *State v. Lee*, 255 S.C. 309, 178 S.E. 2d 652 (1971).

V. *Defendant's claim that his counsel labored under an actual conflict of interest which deprived him of his right to effective assistance of counsel.*

This Court notes at the outset that in every case of multiple representation, the possibility of conflict is present. However, the possibility of conflict is insufficient to impugn a criminal conviction unless an actual conflict adversely affecting the trial attorney's performance can be shown. *Cuyler v. Sullivan*, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980); *Brown v. State*, Ga., 275 S.E. 2d 52 (1981); *Vance v. State*, 275 S.C. 162, 268 S.E. 2d 275 (1980). The Defendant, quite simply, has failed to show that the asserted conflict of interest impaired his defense. *Glasser v. United*

(1972). In any event, Defendant waived any conflict of interest.

This Court further finds that the Defendant knowingly and intelligently waived his Sixth Amendment right to independent counsel under the standard for such waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458 (1938). See *State v. Loftin*, —— S.C. ——, 257 S.E. 2d 575 (1981). Under this standard a criminal defendant can waive his right to any legal representation whatsoever, and it would therefore follow that a criminal defendant could waive the effectiveness of his counsel. In this case, I find that the Defendant Hoffman knew he could obtain separate counsel on request, but intentionally relinquished any such right thereby approving and endorsing the actions of his counsel at trial. Recently, the Georgia Supreme Court found that a criminal defendant may waive effectiveness of his counsel even though the course of his counsel's representation. *See Bentley v. Willis*, Ga., 276 S.E. 2d 639 (1981). I find this authority to be persuasive and in accord with South Carolina law. *Cf. Vance v. State, supra.* It is, therefore,

ORDERED, that the Defendant Hoffman's Motion for a New Trial be, and the same hereby is, denied.

AND IT IS SO ORDERED.

/s/ A. Lee Chandler
A. LEE CHANDLER
Judge
Fifteenth Judicial Circuit

Columbia, South Carolina.

December 4, 1981.

APPENDIX C

Transcript of October 15, 1979
***In Camera* Conference**

IN THE COURT OF GENERAL SESSIONS
STATE OF SOUTH CAROLINA
COUNTY OF HORRY

(79-GS-26-1179, 1180, 1181, 1182, 1184)

STATE

versus

GEORGE F. MOOSE, JOHN R. HOFFMAN, ET AL.

TRANSCRIPT OF RECORD

October 15, 1979
Conway, South Carolina

BEFORE:

HONORABLE A. LEE CHANDLER, Judge.

APPEARANCES:

J. M. LONG, JR., Esq.
Attorney for Defendants.

DIXIE B. COX
Circuit Court Reporter
Fifteenth Judicial Circuit

[2] COURT: All right, Mr. Moose, have a seat right there, Mr. Moose. You are Mr. George Moose?
MR. MOOSE: Yes sir.
COURT: I am—do you know who I am?

MR. MOOSE: I just heard today that you are Judge Chandler. I don't—

COURT: All right, I am the Circuit Judge who will preside over the trials that are about to commence.

MR. MOOSE: Yes sir.

COURT: Now, as I understand it, you are represented by Mr. J. M. "Bud" Long?

MR. MOOSE: Yes sir.

COURT: Now, are you completely satisfied with his services?

MR. MOOSE: Yes sir.

COURT: Now, are you aware of the charges that the State has placed against you in these—in this case? Are you aware that there are two counts of conspiracy to commit murder, and also an accessory after the fact of murder, have been placed against you. Do you understand the charges?

MR. MOOSE: (Nods head affirmative.)

COURT: All right sir. Now, Mr. Moose, are you aware of the fact that Mr. Long, your attorney, also represents two other defendants, Mr. —

MR. MOOSE: Johnny Hoffman and Kathy Danielson.

[3] COURT: All right, are you aware of that?

MR. MOOSE: Yes sir.

COURT: Now, of course, this Court does not know whether you will go to trial, or whether you will enter a plea of guilty. You understand that?

MR. MOOSE: Yes sir.

COURT: But if you should go to trial on the charges against you, are you aware now of the possibility that you may be called to testify?

MR. MOOSE: Yes sir.

COURT: And are you aware of the fact that if you did testify, that your testimony could affect other defendants who are represented by Mr. Long—that it could?

MR. MOOSE: Well, we've gone through that and he said—

COURT: I'm asking you—

MR. MOOSE: Oh, yes sir.

COURT: The question. Are you aware of the fact that your testimony could affect others—Defendants who are represented by Mr. Long? That it could?

MR. MOOSE: Yes sir.

COURT: All right sir. Now, are you aware of the possibility—I'm speaking now of possibility—that the other two Defendants represented by Mr. Long, that they could be called to testify?

[4] MR. MOOSE: Yes sir.

COURT: All right, and that if they were, that their testimony could affect you?

MR. MOOSE: Yes sir.

COURT: All right, now are you also aware of the fact that should you go to trial—and of course, as I say, the Court does not know whether you'll go to trial or not—that if you should, that different verdicts might be returned against you, and the other Defendants represented by Mr. Long, even though the charge might be the same charge. Do you understand that?

MR. MOOSE: Yes sir.

COURT: Now, do you feel that Mr. Long can fully represent you, even though these things may happen?

MR. MOOSE: Yes sir.

COURT: Now, Mr. Moose, are you aware of your absolute Constitutional Right to have a competent and independent attorney represent you?

MR. MOOSE: Yes sir.

COURT: Do you feel that Mr. Long, in the circumstances that we have discussed, is such a competent and independent attorney?

MR. MOOSE: Yes sir.

COURT: All right, now Mr. Moose, if you should elect voluntarily, on your own, to enter a plea of guilty—do [5] you understand me—what I mean by that?

MR. MOOSE: Yes sir.

COURT: If you should do that. Do you understand that even though you may plead guilty to the same charge as other Defendants represented by Mr. Long, that the sentence imposed may be different?

MR. MOOSE: Yes sir.

COURT: You understand that. And knowing and understanding that, do you feel that Mr. Long's representation of you is to your satisfaction?

MR. MOOSE: Yes sir.

COURT: Now, have you understood all the questions that I've asked you?

MR. MOOSE: Yes sir.

COURT: Do you want to ask me any at this time?

MR. MOOSE: Well, on that—on the charge now, could you repeat that again for me?

COURT: The charges that are filed against you are two counts of conspiracy, criminal conspiracy, two counts, and accessory after the fact. You understand those charges?

MR. MOOSE: (Nods head affirmative.) Yes sir.

COURT: Other than the mur—you wanted to be sure about that. Other than that, do you have any questions you want to ask me?

MR. MOOSE: No sir.

[6] COURT: All right sir.

MR. MOOSE: That's all?

COURT: Yes sir.

MR. MOOSE: Thank you, sir.

COURT: Mr. Hoffman?

MR. J. M. LONG, JR.: Judge Chandler, this is Mr. Hoffman.

COURT: Yes sir.

MR. HOFFMAN: Morning, sir.

COURT: Good morning, Mr. Hoffman. Be seated there.

MR. HOFFMAN: Thank you, sir.

COURT: You are Mr. Johnny Hoffman?

MR. HOFFMAN: Yes sir.

COURT: And do you know that I am Circuit Judge A. Lee Chandler, who will preside over the case which is about to commence?

MR. HOFFMAN: I've been advised, yes sir.

COURT: All right, now, it is correct, is it not, that you are represented in this upcoming trial by Mr. J. M. "Bud" Long?

MR. HOFFMAN: Yes sir.

COURT: Are you completely satisfied with his representation of you?

MR. HOFFMAN: Yes sir.

COURT: Now, are you aware of the particular charges [7] that are placed against you, the charge of accessory before the fact of murder, and criminal conspiracy? Are you aware that those are the charges against you?

MR. HOFFMAN: Yes sir.

COURT: All right now, are you aware of the fact that Mr. Long represents, as well as you, two other Defendants in this case?

MR. HOFFMAN: Yes sir, I am.

COURT: Now, in the event that you should go to trial on the charges against you, are you aware of the possibility that while you would not be compelled to testify, that you may be called to testify, and you may voluntarily testify in this case?

MR. HOFFMAN: Yes sir.

COURT: And that if you did testify, that your testimony could affect other Defendants represented by Mr. Long?

MR. HOFFMAN: Yes sir.

COURT: Are you aware of the possibility that the other two Defendants represented by Mr. Long may be called to testify, and may testify?

MR. HOFFMAN: Yes sir.

COURT: And that the testimony of each one of these, should they testify, might affect you?

MR. HOFFMAN: Yes sir, I'm aware of it.

COURT: Are you aware that different verdicts may be [8] returned against you, and other Defendants, even though—represented by Mr. Long, even though the charge is the same?

MR. HOFFMAN: Yes sir.

COURT: In view of these matters which I have asked you about, do you feel that Mr. Long can fully represent you?

MR. HOFFMAN: Yes sir, I do.

COURT: Now, Mr. Hoffman, are you aware of your absolute Constitutional Right to competent, independent legal counsel?

MR. HOFFMAN: Yes sir, I am.

COURT: Do you feel that you have such counsel in Mr. Long?

MR. HOFFMAN: Yes sir, I do.

COURT: Has he fully disclosed to you the fact that he represents the other two Defendants?

MR. HOFFMAN: Yes sir, he has.

COURT: All right sir, now, I—of course, this Court does not know if you will proceed to trial, or if you should enter a plea of guilty. Do you understand that?

MR. HOFFMAN: Yes sir.

COURT: The Court would have no way of knowing and it would not be a part of the Court's—to know this, but in the event you should enter a plea of guilty, do you understand that even though you may plead guilty to the same charge as other Defendants represented by Mr. Long, that different sentences could be imposed?

[9] MR. HOFFMAN: Yes sir.

COURT: All right, now understanding all these matters that we have discussed, are you completely satisfied for Mr. J. M. Long to continue his representation of you?

MR. HOFFMAN: Yes sir, I am.

COURT: Do you have any objection to his representation of the other two Defendants?

MR. HOFFMAN: None whatsoever, sir.

COURT: Thank you, sir.

MR. HOFFMAN: Thank you, sir.

COURT: Bring him back in here.

MR. HOFFMAN: I'm sorry, sir.

COURT: That's all right. Mr. Hoffman, I had not intended to include that the charges against you included conspiracy—criminal conspiracy, and I inadvertently said that the charges against you included criminal conspiracy. The charge against you is that of accessory before the fact of murder. You understand that, sir?

MR. HOFFMAN: Yes sir.

COURT: All right, thank you.

MR. HOFFMAN: Thank you, sir.

MR. LONG: Judge Chandler, this is Ms. Danielson, and her father, Mr. A. J. Danielson.

COURT: All right, Mr. Danielson, have a seat. You sit in this chair, and let your father sit over here.

[10] MR. DANIELSON: Okay, thank you.

COURT: You are Kathy Danielson?

MS. DANIELSON: That's right.

COURT: Ms. Danielson, I'm Circuit Judge A. Lee Chandler who will preside over the case that's about to commence. Do you understand that?

MS. DANIELSON: Yes sir.

COURT: Now, Ms. Danielson, you are represented in this matter by Mr. J. M. "Bud" Long. Is that correct?

MS. DANIELSON: Yes sir.

COURT: Are you completely satisfied with his services and representation as a lawyer?

MS. DANIELSON: Yes sir, I think he's doing a good job.

COURT: All right, are you aware of the particular charges that have been placed against you by the State?

MS. DANIELSON: Yes, I am.

COURT: All right, the charge of criminal conspiracy, that is, conspiracy to commit murder, and also a charge of accessory after the fact of murder.

MS. DANIELSON: Yes sir.

COURT: Are you aware of the fact that Mr. Long represents two other Defendants in this same matter?

MS. DANIELSON: Yes.

COURT: And you are aware that they are Mr. Hoffman and Mr. Moose?

[11] MS. DANIELSON: That's right.

COURT: Now, of course, the Court—it's not part of the Court to know whether you are actually going to trial, or whether you will plead guilty or what, but in the event you should go to trial, if you should, are you aware of the possibility that you may be called to testify, and that you may testify?

MS. DANIELSON: Yes.

COURT: If you do not refuse, and if you do testify, are you aware of the fact that your testimony could affect other Defendants represented by Mr. Long?

MS. DANIELSON: Well, I—

COURT: That it could?

MS. DANIELSON: I've never—I'd really—

COURT: I'm asking you that if you go to the stand and testify, are you aware of the fact that what you say could affect other Defendants represented by him?

MS. DANIELSON: Yes.

COURT: All right, are you aware, if you should testify or—excuse me—are you aware of the possibility that the other two Defendants represented by Mr. Long, if they should testify, that their testimony could affect you?

MS. DANIELSON: Yes.

COURT: All right, are you aware that if you should go to trial—and again, I tell you, I don't know whether you [12] will or not, but if you should go to trial, are you aware of the fact that different verdicts may be returned against you and as against other Defendants represented by Mr. Long, even where the charge is the same? Are you aware that that could happen?

MS. DANIELSON: Uh huh (indicating positive.)

COURT: All right, now, do you feel, with the matters that I've discussed with you, that Mr. Long can fully and completely represent you?

MS. DANIELSON: Yes, I do.

COURT: All right now, are you aware of the fact that the Constitution of the United States and South Carolina guarantees to you the right to have a competent, capable, independent attorney? Are you aware of that?

MS. DANIELSON: Yes sir.

COURT: Do you feel that, in the light of the matters now that I've discussed with you by these questions, that Mr. Long is such an attorney?

MS. DANIELSON: Yes, I think that he'll do the best job that anybody else could do.

COURT: All right now, in the event you should enter a plea of guilty to any charges, presuming for the moment that that were to happen, do you understand that even though you may plead guilty to the same charge that other Defendants represented by him plead guilty to, that the sentence imposed [13] by the Court could be different?

MS. DANIELSON: Yes sir.

COURT: And knowing that, and understanding that, do you feel that you wish to continue with his representation of you?

MS. DANIELSON: Yes sir.

COURT: Thank you, mam. Just a minute. Just a minute. You are Mr.—let the record show that Ms. Danielson was accompanied to this in camera proceeding by her father—

MR. DANIELSON: A. J. Danielson.

COURT: Mr. A. J. Danielson of—where are you living?

MR. DANIELSON: Charlotte.

COURT: Of Charlotte, and let me—all right, Mr. Danielson, did you hear all of the questions that I asked your daughter?

MR. DANIELSON: Yes, I did.

COURT: Kathy Danielson, did you understand my questions?

MR. DANIELSON: Yes, I did, sir.

COURT: Did you understand her answers?

MR. DANIELSON: Yes, I did, sir.

COURT: Do you have any knowledge or information that would conflict, in any way, with her answers to me?

MR. DANIELSON: No, I do not.

COURT: Are you satisfied with Mr. Long's representa- [14] tion of your daughter?

MR. DANIELSON: Yes, I am, sir.

COURT: And you are aware that he represents two other Defendants in the same charges—arising out of the same matter?

MR. DANIELSON: Yes, I am. I'm aware of that.

COURT: Do you have anything now that you want to ask me, or add to this at this time?

MR. DANIELSON: No, I don't believe I do, sir. Thank you.

COURT: All right, and now, Ms. Danielson, do you have anything you want to ask me at this time?

MS. DANIELSON: No sir.

COURT: Thank you, mam.

MR. DANIELSON: Thank you, sir.

COURT: Yes sir.

(THE FOLLOWING TAKES PLACE AFTER A CONFERENCE WITH THE CLERK OF COURT AND THE SHERIFF OF HORRY COUNTY CONCERNING THE SEQUESTRATION OF THE JURY VENIRE.)

COURT: That the three—that the conferences with each of the three Defendants was in the presence of—was in the absence of Mr. Long, and was in the presence of the Court Reporter, the Clerk for Judge Chandler, Mr. Steven Koeppel, and in the case of Ms. Danielson, her father.

All right, let the record show that at the completion [15] of the individual conferences that the Court is requesting the three Defendants to come in to chambers together, and in the absence of Mr. Long.

All right, the three Defendants.

(AT THIS TIME, THE THREE DEFENDANTS ENTERED THE JUDGE'S CHAMBERS.)

COURT: I have called you together, as a group, the three Defendants, who are represented by Mr. Long, and as well, the father of Ms. Danielson. I ask that if any Defendant has any misunderstanding of any of the questions that were asked when you came—when each of you came individually. Any questions?

MR. MOOSE: No sir.

COURT: All right, any questions, Mr. Hoffman?

MR. HOFFMAN: No sir.

MS. DANIELSON: No sir.

COURT: Mr. Danielson?

MR. DANIELSON: No.

COURT: All right now, you are together, and I ask you if each of you is completely satisfied with the representation of Mr. Long.

MR. MOOSE: Yes sir.

MR. HOFFMAN: That's correct.

COURT: And each of you—and I ask you if each of you is satisfied with the services of Mr. Long, knowing of [16] his representation of each one of you?

MR. MOOSE: Yes sir.

MR. HOFFMAN: Yes sir.

COURT: All right, let the record show that immediately following the questions asked of the three Defendants, and Mr. Danielson, in the absence of Mr. Long, that the Court summoned Mr. Long to be present.

Mr. Long, I have examined, out of your presence, individually, and as a group, the three Defendants represented by you, as to their awareness of your represen-

tation of each one, as to their awareness that in the event they should elect to go to trial, and further, elect to testify, that the testimony of each might affect the other. Each has indicated that he or she understands, and further that each has indicated to the Court that he or she understands that—excuse me just a minute. Did I (OFF THE RECORD)

That his or her testimony might (OFF THE RECORD)

That the testimony of any of the other Defendants represented by Mr. Long might affect him or her.

I have—Mr. Long, I have examined each of them as to whether they consider that, in the light of these matters, you could fully represent them as Constitutionally guaranteed competent and independent counsel. Each has indicated, without reservation, that that Defendant feels you could, and that each is completely satisfied with your services.

[17] I have further examined them as to the possibility that one or more might—that there is the possibility that—it is possibility that in the event any one of them should enter a plea of guilty to the charges, that one Defendant might receive a different sentence from the Court from another Defendant, even though the charges pled guilty to might be the same. Each has indicated his or her understanding of this possibility, and has indicated that with knowledge of this fact, that each wishes to continue your representation.

Mr. Long, do you have anything to add to this?

MR. LONG: If Your Honor please, from the beginning, as each one came along and was arrested, I have discussed with them my representation of the others who I was representing at the time of the employment, and I have tried my best to explain to them the probabilites and possibilities in connection with this thing, and each of them has told me that they fully understood the situation and they wanted me to continue representing them.

I have examined the facts, as I understand them to be, sir, and I can see no possibility of a conflict with any

of them, as I understand it. I've gone over it with them at least twice that I know of, sir, to be certain that they understood, and that they were aware of what was happening to all of them in connection with it.

[18] COURT: You have gone over the matter of a possible conflict?

MR. LONG: Yes sir. Yes sir, and as to what each of them plan to do in connection with the trial of the case.

COURT: All right, now let the record indicate—does each one of you Defendants—did you—each one of you hear what Mr. Long has just said?

MR. MOOSE: Yes sir.

MR. HOFFMAN: Yes sir.

COURT: Did each one of you understand what he just said?

MR. MOOSE: Yes sir.

MR. HOFFMAN: Yes sir.

COURT: Does each one of you agree, or disagree, with what he has just said?

MR. MOOSE: I agree.

MR. HOFFMAN: I agree.

COURT: All right, does each of you understand the purpose of the Court inquiring into this matter?

MR. HOFFMAN: Yes sir.

COURT: The purpose being to determine, for your benefit as well as that of the attorney, that the representation of more than one Defendant, in—arising out of the same difficulty, calls for a determination that no conflict exist.

[19] MR. HOFFMAN: Yes sir.

MR. MOOSE: Yes sir.

COURT: All right.

MR. LONG: Your Honor, for the record, I'd like to say how much I personally appreciate you calling this hearing, sir, and as their attorney, I appreciate your inquiring of them for their protection, and certainly I

appreciate your inquiring for my protection, and I'm grateful to the Court for that.

MR. HOFFMAN: I am too, sir. Thank you.

MR. MOOSE: We thank you.

COURT: All right, we're ready to proceed.

MR. LONG: Fine. Thank you, Your Honor.

END OF REQUESTED TRANSCRIPT OF RECORD

82-1942

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

JOHN R. HOFFMAN, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

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Post Office Box 11549
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ATTORNEYS FOR RESPONDENT.

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ATTORNEYS FOR RESPONDENT.

QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court properly uphold the trial court's denial of the Petitioner's motion for a new trial on the basis that the Petitioner's trial counsel was laboring under an actual conflict of interest arising from the multiple representation of clients which denied the Petitioner the effective assistance of counsel?

II.

Did the South Carolina Supreme Court properly uphold the trial court's denial of Petitioner's motion for a new trial on the basis that the Solicitor's comments in closing argument concerning Petitioner's attorney's joint representation of Petitioner and two codefendants were prejudicial and denied

Petitioner the effective assistance of counsel?

III.

If there existed any conflict of interest for Petitioner's attorney, Mr. Long, did the Petitioner knowingly, voluntarily, and intelligently waive his right to conflict-free counsel?

INDEX

Cases Involved ---------- iv

Opinion Below ---------- 1

Jurisdiction ---------- 1

Questions Presented ---------- 2

Argument

Question I ---------- 3

Question II ---------- 10

Question III ---------- 16

Conclusion ---------- 31

TABLE OF AUTHORITIES

Page

CASES:

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) -------- 7

Evans v. Bruce, 245 S.C. 42, 138 S.E.2d 643 (1964) -------- 13

Glasser v.United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) ----- 26

Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) -------- 25

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) --------- 26

State v. Anderson, 253 S.C. 168, 169 S.E.2d 706 (1969) -------- 13

State v. Fields, 264 S.C. 260, 214 S.E.2d 320 (1975) -------- 13

State v. Jones, 268 S.C. 227, 233 S.E.2d 287 (1977) -------- 12

State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959) -------- 13

State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961) -------- 16

State v. Penland, 275 S.C. 537, 273 S.E.2d 537 (1981) -------- 13

State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980) -------- 15

United States v. Cox, 580 F.2d 317 (8th Cir. 1978), cert. denied, 439 U.S. 1075, 99 S.Ct. 851, 59 L.Ed.2d 43 ----- 27

United States v. DeFillipo, 590 F.2d 1228, 1240 (2d Cir. 1979) ---------- 28

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) ---------- 27, 28

United States v. LaRiche, 549 F.2d 1088 (6th Cir. 1977), cert. denied, 430 U.S. 987, 97 S.Ct. 1687, 52 L.Ed.2d 383 --------- 27

United States v. Laura, 667 F.2d 365 (3d Cir. 1981) ---------- 26

United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977), 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 60, reh. denied, 436 U.S. 951, 98 S.Ct. 2860, 56 L.Ed.2d 794 --------- 27, 28

United States v. Partin, 601 F.2d 1000 (9th Cir. 1979), cert. denied, 446 U.S. 964, 100 S.Ct. 2939 ---------- 9

United States v. Villareal, 554 F.2d 235 (5th Cir. 1977), cert. denied, 434 U.S. 802, 98 S.Ct. 29, 54 L.Ed.2d 60 ---------- 27

United States v. Waldman, 579 F.2d 649 (1st Cir. 1978) ---------- 27

Vance v. State, 275 S.C. 162, 268 S.E.2d 275 (1980) -------- 7

TREATISES:

7A West's South Carolina Digest, Criminal Law §1036 ---------- 12

7A West's South Carolina Digest, Criminal Law §1037 ---------- 15

SOUTH CAROLINA SUPREME COURT RULES

Rule 4, Section 6, Rules of Practice of the South Carolina Supreme Court ------- 13

IN THE

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STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Memorandum Opinion No. 83-MO-57, filed March 30, 1983, as reproduced in Petitioner's Appendix A at pages 1a-2a.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court properly uphold the trial court's denial of the Petitioner's motion for a new trial on the basis that the Petitioner's trial counsel was laboring under an actual conflict of interest arising from the multiple representation of clients which denied the Petitioner the effective assistance of counsel?

II.

Did the South Carolina Supreme Court properly uphold the trial court's denial of Petitioner's motion for a new trial on the basis that the Solicitor's comments in closing argument concerning Petitioner's attorney's joint representation of Petitioner and two codefendants were prejudicial and denied Petitioner the effective assistance of counsel?

III.

If there existed any conflict of interest for Petitioner's attorney, Mr. Long, did the Petitioner knowingly, voluntarily, and intelligently waive his right to conflict-free counsel?

ARGUMENT

I.

The South Carolina Supreme Court properly upheld the trial court's denial of the Petitioner's motion for a new trial on the basis that the Petitioner's trial counsel was laboring under an actual conflict of interest arising from the multiple representation of clients which denied the Petitioner the effective assistance of counsel.

On appeal to the South Carolina Supreme Court, the Petitioner asserted that his trial counsel was laboring under an actual conflict of interest

arising from his representation of one of Petitioner's coconspirators who testified for the State at Petitioner's trial which thus denied the Petitioner the effective assistance of counsel. The Respondent would submit, in light of the testimony of the Petitioner and his coconspirator at trial, and considering the fact that the Petitioner was represented at trial by two attorneys, one of whom Petitioner does not allege to have had a conflict, that the Petitioner has not demonstrated that an actual conflict existed which adversely affected his legal representation at trial.

The record reflects that the Petitioner's brother-in-law and coconspirator, George Moose, was arrested on June 27, 1979. (Tr. p. 13). On July 2, 1979, the Petitioner paid J.

M. Long, Esquire, Fifteen Thousand Dollars ($15,000) to represent Mr. Moose. (Tr. p. 1644). On July 26, 1979, the Petitioner paid Mr. Long the first installment toward another Fifteen Thousand Dollar ($15,000) fee to represent the Petitioner. (Tr. p. 1645). On August 17, 1979, another coconspirator, Bill Bryant, made a statement to police. (Tr. p. 16). On August 17, 1979, an arrest warrant was issued for the Petitioner. (Tr. pp. 1-2). On that same date, the Petitioner was telephoned out of state by his attorney, Mr. Long and advised that an arrest warrant had been issued for him. On the following day, August 18, the Petitioner turned himself in to the police. (Tr. p. 1297). On August 18, Mr. Long negotiated an oral plea agreement for Mr. Moose. (Tr. p. 16).

On August 21, 1979, Mr. Moose made his statement to the police. (Tr. p. 628, lines 15-18). Mr. Moose testified at Petitioner's trial and at his plea hearing that he had not advised Mr. Long about his involvement in the crime until a couple of days before his statement. (Tr. p. 629, lines 3-12; p. 285, lines 17-21). He further testified that he had originally remained silent in an effort to help the Petitioner and that only after the Petitioner advised him through Mr. Long to talk and tell the truth had he made his statement. (Tr. p. 671, lines 2-12; p. 672, lines 1-7). Between the time of Mr. Moose's initial arrest and Petitioner's trial, Mr. Moose was out on bond. During most of this period he stayed with the Petitioner. (Tr. p. 653, lines 1-24).

The Respondent would submit that under the facts of this cse, the South Carolina Supreme Court properly found that the Petitioner has not shown a conflict which adversely affected his legal representation at trial. In order to demonstrate a violation of a Sixth Amendment right, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Vance v. State, 275 S.C. 162, 268 S.E.2d 275 (1980). In this case, assuming that the testimony of the Petitioner and Mr. Moose constituted the information they provided to their attorney, Mr. Long, it is clear that Mr. Moose was guilty as a conspirator in the murder and that the only defense available to the Petitioner was the

defense of withdrawal. Based on these facts, it was in the best interests of Mr. Moose, whether represented by Mr. Long or another independent counsel, to plea bargain in exchange for his testimony. Whether or not represented by Mr. Long, the Petitioner would have been confronted with Mr. Moose's testimony at trial. Since the Petitioner would have been confronted with the testimony of Moose at trial no matter who his attorney was, there was no actual conflict which adversely affected the representation of Petitioner at this point. In fact, considering the nature of Petitioner's defense, it is more than arguable that the access of Petitioner to Moose due to his intended testimony and his statements aided the Petitioner in preparation of his defense. Thus since

there was no conflict which affected the adequacy of Petitioner's representation prior to trial, the question becomes was the Petitioner's legal representation affected at trial? It is clear that it was not, because of the fact that at trial Petitioner was represented by other independent counsel who suffered under no conflict of interest and who conducted a thorough cross-examination of Moose and commented on Moose and his testimony in closing argument. United States v. Partin, 601 F.2d 1000 (9th Cir. 1979), cert. denied, 446 U.S. 964, 100 S.Ct. 2939. Thus there was no conflict of interest which adversely affected the representation of the Petitioner under the facts and the defenses raised at trial.

The Respondent would submit that the Petitioner reads much into the South

Carolina Supreme Court's summary affirmation of the trial court's judgment. The opinion merely stated that "...no error of law is present, and that a full written opinion would be without precedential value." The precise grounds for the holding are not known. This issue may well have been decided based on the Petitioner's waiver of any denial of rights. (See Question III). This question is without merit.

II.

The South Carolina Supreme Court properly upheld the trial court's denial of Petitioner's motion for a new trial on the basis that the Solicitor's comments in closing argument concerning Petitioner's attorney's joint representation of Petitioner and two codefendants were prejudicial and denied

Petitioner the effective assistance of counsel.

The Petitioner alleges that certain questions asked coconspirators, Danielson and Moose, and certain statements made by the Solicitor during closing argument constituted improper prejudicial comment by the Solicitor on the joint representation of the Petitioner and his two coconspirators by the Petitioner's trial counsel, Mr. Long. The Respondent would submit as to the questions asked the coconspirators, that the questions constituted a proper line of inquiry, that no objection was made at trial to the questions, that the questions were not made the subject of proper exception on appeal and that the issue as it relates to these questions was properly decided by the South Carolina Supreme Court. As for the

comments during closing argument, the Respondent would submit that no objection was made at trial nor was the issue made a basis for the motion for a new trial before the lower court and thus the issue was properly resolved against the Petitioner on appeal.

As for the questions asked Danielson and Moose, the South Carolina Supreme Court has long held that questions asked and answered without objection at trial cannot be challenged for the first time on appeal. State v. Jones, 268 S.C. 227, 233 S.E.2d 287 (1977); 7A South Carolina Digest, Criminal Law §1036. A defendant may not reserve a vice until he learns what the result will be and following an unfavorable verdict seek to take advantage of the alleged error on appeal. State v. Penland, 275 S.C. 537,

273 S.E.2d 537 (1981); State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959). This rule applies in cases where although the death penalty is sought, a sentence less than death was given. State v. Fields, 264 S.C. 260, 214 S.E.2d 320 (1975); State v. Anderson, 253 S.C. 168, 169 S.E.2d 706 (1969). Further, issues on appeal are brought before the Court by proper exception. Rule 4, Section 6, Rules of Practice of the South Carolina Supreme Court. Where there is no exception which presents the issue for decision there is nothing to be decided and consideration of the issue should be dismissed. Evans v. Bruce, 245 S.C. 42, 138 S.E.2d 643 (1964). In this case the record is clear that no objection was made to the questions asked of Danielson and Moose which the Petitioner now

challenges as set out in his brief. Also, a review of the Petitioner's exceptions clearly indicates that no exception seeks to challenge the evidence in issue. (Tr. pp. 1657-1658). Thus, the issue was properly decided by the South Carolina Supreme Court.

However, assuming that the issue was preserved and made the subject of a proper exception on appeal, the record reflects that the questions were proper. A review of the evidence in context clearly indicates that the purpose of the questions was to elicit from Danielson and Moose that their testimony and statements were voluntarily and freely given without coercion and with the advice of their counsel.

As for the comments during closing argument, the record is clear that there was no objection to the argument made by

the Petitioner during or after the argument. Where a defendant fails to object to improper argument he waives consideration of the issue on appeal. State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980); 7A West's South Carolina Digest, Criminal Law §1037. Further, it is clear from the record that while the Petitioner raised the issue as his exception number three (3) on appeal as having been presented to the trial court as a ground for a new trial (Tr. p. 1657), the issue was not set forth in the order of the trial court as being a separate ground for a new trial. (Tr. p. 1652). However, even assuming the issue was raised as a basis for a new trial motion, the South Carolina Supreme Court has clearly held that an objection to improper argument raised for the first time on a motion for a new trial

is too late. State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961).

The argument is without merit.

III.

If there existed any conflict of interest for Petitioner's attorney, Mr. Long, the Petitioner knowingly, voluntarily, and intelligently waived his right to conflict-free counsel.

On October 15, 1979, the trial court held a special hearing in chambers in Horry County, concerning Mr. Long's representation of multiple clients and the understanding and position of the Petitioner, Mr. Moose and Miss Danielson concerning that representation. During that hearing the trial judge met with each defendant individually, then with the three defendants together and then with the three defendants and their

attorney, Mr. Long. (Tr. p. 21, line 1-p. 34, line 16; p. 34, line 17-p. 36, line 3; p. 36, line 4-p. 39, line 14). During that hearing (although the entire hearing was relevant to the potential conflict issue and any waiver) the following colloquy occurred between the Petitioner and the trial court:

> COURT: All right, now it is correct, is it not, that you are represented in this upcoming trial by Mr. J.M. "Bud" Long?
>
> MR. HOFFMAN: Yes sir.
>
> COURT: Are you completely satisfied with his representation of you?
>
> MR. HOFFMAN: Yes sir.
>
> COURT: Now, are you aware of the particular charges that are placed against you, the charge of accessory before the fact of murder, and criminal conspiracy? Are you aware that those are the charges against you?
>
> MR. HOFFMAN: Yes sir.
>
> COURT: All right now, are you aware of the fact that Mr. Long represents, as well as you, two other defendants in this case?

MR. HOFFMAN: Yes sir, I am.

COURT: Now, in the event that you should go to trial on the charges against you, are you aware of the possibility that while you would not be compelled to testify, that you may be called to testify, and you may voluntarily testify in this case?

MR. HOFFMAN: Yes sir.

COURT: And that if you did testify, that your testimony could affect other defendants represented by Mr. Long?

MR. HOFFMAN: Yes sir.

COURT: Are you aware of the possibility that the other two defendants represented by Mr. Long may be called to testify, and may testify?

MR. HOFFMAN: Yes sir.

COURT: And that the testimony of each one of these, should they testify, might affect you?

MR. HOFFMAN: Yes sir, I'm aware of it.

COURT: Are you aware that different verdicts may be returned against you, and other defendants, even though--represented by Mr. Long, even though the charge is the same?

MR. HOFFMAN: Yes sir.

COURT: In view of these matters which I have asked you

about, do you feel that Mr. Long can fully represent you?

MR. HOFFMAN: Yes sir, I do.

COURT: Now, Mr. Hoffman, are you aware of your absolute constitutional right to competent, independent legal counsel?

MR. HOFFMAN: Yes sir, I am.

COURT: Do you feel that you have such counsel in Mr. Long?

MR. HOFFMAN: Yes sir, I do.

COURT: Has he fully disclosed to you the fact that he represents the other two defendants?

MR. HOFFMAN: Yes sir, he has.

COURT: All right sir, now, I--of course, this Court does not know if you will proceed to trial, or if you should enter a plea of guilty. Do you understand that?

MR. HOFFMAN: Yes sir.

COURT: The Court would have no way of knowing and it would not be a part of the Court's--to know this, but in the event you should enter a plea of guilty, do you understand that even though you may plead guilty to the same charge as other defendants represented by Mr. Long, that different sentences could be imposed?

MR. HOFFMAN: Yes sir.
COURT: All right, now understanding all these matters that we have discussed, are you completely satisfied for Mr. J. M. Long to continue his representation of you?
MR. HOFFMAN: Yes sir, I am.
COURT: Do you have any objection to his representation of the other two defendants?
MR. HOFFMAN: None whatsoever, sir.
COURT: Thank you, sir.
MR. HOFFMAN: Thank you, sir. (Tr. p. 26, lines 18-p. 29, line 10). (Emphasis added).

Again on November 26, 1979, before the start of Petitioner's trial after its transfer to Georgetown County, the trial court again held an in camera hearing concerning Mr. Long's multiple representation of clients during which the Petitioner again advised the trial court that he did not consider there to be any conflict which required separate counsel and that he desired to have Mr.

Long continue to represent him. (Tr. p. 44, lines 18-22; p. 45, lines 13-16; p. 45, lines 21-25).

The record further reflects that prior to Petitioner's trial in Georgetown County, William Doar, Esquire, was hired to represent the Petitioner in addition to Mr. Long. (r. p. 1646). During voir dire the prospective jurors were advised repeatedly without objection that the Petitioner was represented by Mr. Long and Mr. Doar as trial counsel. (Tr. p. 51, lines 15-17; p. 60, lines 22-23; p. 94, lines 19-21; p. 110, lines 11-12; p. 124, lines 6-8; p. 141, lines 17-19; p. 152, lines 4-7; p. 169, lines 8-9; p. 179, lines 13-16; p. 200, lines 21-24; p. 228, lines 2-5; p. 247, lines 16-18). During the Petitioner's trial Mr. Doar gave an opening statement and a closing

argument, made motions and most importantly, conducted the cross-examination of Mr. Moose. (Tr. p. 311, line 9-p. 314, line 20; p. 674, line 25-p. 689, line 11; p. 1444, lines 4-11; p. 1486, line 2-p. 1505, line 8).

At trial the testimony of the Petitioner and George Moose basically agreed that in the Fall of 1978 the Petitioner and Moose first discussed the killing of the victim, that the Petitioner then agreed to pay Five Thousand Dollars ($5,000) for the murder; that the Petitioner gave Moose the money; that Moose gave the money to Bill Bryant to hire the assasin; and that after several months without luck in obtaining a hired assasin, the money was returned to the Petitioner. (Tr. p. 631, line 3-p. 649, line 10; p. 1266, line 21-p. 1241, line 15). The

Petitioner testified that after he got his money back in late February or early March 1979, he did not talk to Moose until after the victim had been murdered (Tr. p. 1241, line 19-p. 1242, line 13); although he admitted during cross-examination that in his initial statement to the police that one night while drunk he remembered a call, did not remember much about the call but did remember telling Moose to go ahead with the killing. (Tr. p. 1261, lines 8-18). He further testified that during this time he was drinking heavily, at least a quart of 160 proof vodka each day, which he stopped on Easter Sunday, 1979. (Tr. p. 1232, line 21-p. 1233, line 21; p. 1242, lines 13-17; p. 1244, lines 4-8). Moose testified that after the money had been given back to the Petitioner, he received a telephone call from another

conspirator as to whether the killing was still on; that he, Moose, then called Petitioner to find out and that the Petitioner gave them the go-ahead. (Tr. p. 651, line 16-p. 652, line 12; p. 654, line 18-p. 655, line 14). However, on this critical point Moose stated in his testimony for the first time that the Petitioner sounded drunk during the telephone call and that it was hard for him to understand the Petitioner. (Tr. p. 652, lines 13-23). Both men agreed that after the killing the Petitioner paid the Five Thousand Dollars ($5,000) for the killing. (Tr. p. 664, lines 10-15; p. 1245, line 23-p. 1246, line 20). In closing argument the Petitioner argued the defense of withdrawal and that as to the call whereby the Petitioner gave the go-ahead, either the Petitioner was so drunk that he did not

make a valid commitment which Moose should have known, or that in an effort to save himself Moose trumped up the alleged go-ahead statement which the Petitioner could neither admit or deny due to his drunken state at the time. (Tr. p. 1498, line 18-p. 1501, line 20; p. 1504, lines 9-14; p. 1553, lines 1-24).

Multiple representation of clients is not per se violative of the Sixth Amendment right to the effective assistance of counsel. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Even where such multiple representation involves a potential or actual conflict of interest, a defendant may waive such conflict if such waiver is made knowingly and intelligently. Holloway v. Arkansas, supra, 435 U.S. at 483, n. 5, 55 L.Ed.2d at 433, n. 5; Glasser v.

United States, 315 U.S. 60, 70-71, 62 S.Ct. 457, 86 L.Ed. 680, 699-700 (1942). The standard for measuring an effective waiver of such a constitutional right as the right to counsel, requires that the waiver must be an intentional relinquishment or abandonment of a known right. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Where the trial court is advised that a conflict does or may exist and the trial court holds a hearing in which the court informs the defendants of their right to independent counsel, explains basically the type of conflict which may arise and in which the defendants expressly waive any conflicts, the trial court has fulfilled its duty and the right to independent counsel is waived by the defendants. United States v. Laura, 667 F.2d 365 (3d Cir. 1981); United States

v. Cox, 580 F.2d 317 (8th Cir. 1978), cert. denied, 439 U.S. 1075, 99 S. Ct. 851, 59 L. Ed.2d 43; United States v. Waldman, 579 F.2d 649 (1st Cir. 1978); United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977), 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 60, reh. denied, 436 U.S. 951, 98 S.Ct. 2860, 56 L.Ed.2d 794; United States v. Villareal, 554 F.2d 235 (5th Cir. 1977), cert. denied, 434 U.S. 802, 98 S.Ct. 29, 54 L.Ed.2d 60; United States v. LaRiche, 549 F.2d 1088 (6th Cir. 1977), cert. denied, 430 U.S. 987, 97 S.Ct. 1687, 52 L.Ed.2d 383; United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). In Garcia, a landmark case in this area, the Fifth Circuit Court of Appeals stated that where a trial court is advised of a potential conflict, the trial court should address each defendant personally and advise of

potential dangers of representation by counsel with a conflict. Further the defendants should be free to question the court on the nature and consequences of his representation. The Fifth Circuit held in Garcia that where a defendant after such a thorough consultation with the court knowingly, intelligently, and voluntarily waives his right to conflict-free counsel, the Constitution does not prevent the waiver. In Lawriw, the Eighth Circuit stated that where such a hearing is held a defendant's contention of lack of knowledge is incredible. As Justices Lumbard and Mansfield wrote in their concurring opinion in United States v. DeFillipo, 590 F.2d 1228, 1240 (2d Cir. 1979):

> If we are to inquire into claims of prejudice in every case where codefendants have

> been convicted after trial during which two or more of them were represented by the same counsel despite full warning by the court of the dangers of such representation we are inviting the creation of strategies and situations during the course of trial which may lend color to claims of prejudice from conflicts of interests when the convictions are on appeal.

In this case as soon as the court was advised of a potential conflict, the court held an in camera hearing with each individual defendant, then the three defendants, and then the three defendants and their attorney. The court specifically discussed with the Petitioner the potential conflicts which could arise, especially the potential for conflict arising from the testimony of his coconspirators. The court asked the Petitioner if he had discussed the matter fully with his attorney, whether the defendant had any questions and if

the defendant still wished to proceed with Mr. Long. The Petitioner, a wealthy and very successful businessman who hired and paid Mr. Long to represent him and his brother-in-law, expressed his full understanding of the situation and not only his waiver of any conflicts but his express desire to proceed to trial with Mr. Long. Before his trial in Georgetown County, the court held another hearing and asked the Petitioner if he had changed his mind; he stated no change in his position. Clearly, the trial court fulfilled any obligation to the Petitioner and the Petitioner clearly waived any conflict.

The Respondent would respectfully submit that the South Carolina Supreme Court acted in complete accord with State and Federal law in upholding the Petitioner's conviction. This Petition

for a Writ of Certioari is therefore without merit.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 82-1942

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

JOHN R. HOFFMAN,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

Cases: Page

Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981), *cert. denied*, 456 U.S. 1011 (1982) 3

Cuyler v. Sullivan, 446 U.S. 335 (1980) 1, 2

Estelle v. Williams, 425 U.S. 501 (1976) 4

Laskey v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956) 3

Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980) 3

United States v. DeFillipo, 590 F.2d 1228 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979) 6

Wainwright v. Sykes, 433 U.S. 72 (1977) 4

Miscellaneous:

ABA Model Code of Professional Responsibility DR5-105(D) 3

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1. As to whether *Cuyler v. Sullivan*, 446 U.S. 335 (1980), requires a defendant to satisfy a two-part test to establish a Sixth Amendment violation, the Brief in Opposition begs the question raised by this petition of whether there is a conflict among the circuits. The Brief in Opposition does not dispute that the trial court required evidence of an adverse effect on counsel's performance in addition to evidence of an actual conflict of interest. Nor does it dispute that there is a significant split among the circuits and state supreme courts as to whether that reading of the *Cuyler v. Sullivan* standard is correct. Thus, nothing in the Brief in Opposition de-

nies that this case provides an appropriate vehicle to resolve that split.

2. The Brief in Opposition, at 8, suggests that co-defendant Moose would have plea bargained and testified against petitioner whether or not Moose was represented by attorney Long. But this, too, begs the question, which under either interpretation of *Cuyler v. Sullivan* is whether Long actively represented conflicting interests —*i.e.*, whether he acted contrary to petitioner's interest in order to further the interest of Moose. The answer to that question does not turn on speculation as to what independent counsel for Moose might have done. The incontrovertible fact is that, while representing petitioner, Long assisted the State in procuring the key witness—Moose—*against* petitioner. Having done so, Long then failed to cross-examine Moose and, when the state solicitor exploited Long's conflict of interest by commenting on his dual representation in closing argument, failed to object. Long's ongoing representation of Moose's interests during petitioner's trial could not have been more "active."

3. The Brief in Opposition, at 9, misstates the record and the law in asserting that "petitioner was represented by other independent counsel who suffered under no conflict of interest." Petitioner chose Long as his trial counsel. The record establishes that Long initiated the idea of associating state senator William Doar for the second trial (after a change of venue to Senator Doar's county) and did so solely for the purpose of obtaining Doar's assistance in selecting a jury. TR. 1646. Petitioner did not understand that Doar would play any part in the trial and never discussed the facts of the case with him. TR. 1646. The facts simply do not support the suggestion that petitioner retained Doar as independent counsel as a response to Long's conflict of interest.

As a matter of law, moreover, Doar's retention could not eliminate the constitutional problem created by Long's

conflict. It is a basic principle that an attorney cannot remove a conflict of interest by transferring a case to another member of his firm. *Laskey v. Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); ABA Model Code of Professional Responsibility, DR 5-105(D). Thus, for example, in *Ross v. Heyne*, 638 F.2d 979 (7th Cir. 1980), the court held that there was an actual conflict even though the co-defendants were represented by separate counsel—because the attorneys were partners and each was privy to information about the other's client. *A fortiori*, an attorney cannot eliminate his conflict of interest by continuing to represent co-defendants and merely associating another attorney to assume a second-chair role on behalf of one defendant. *See Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981), *cert. denied*, 456 U.S. 1011 (1982).[1]

4. Significantly, the Brief in Opposition does not dispute that: (1) the state solicitor commented on Long's conflict of interest in order to attack petitioner's credibility on the central factual question in the case and (2) the comment raises a novel and important constitutional issue. The Brief in Opposition only argues lamely that the issue was not presented to the trial court and

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[1] The facts here are even more redolent of a continuing conflict than in *Baty v. Balkcom*. There, attorney Smith represented co-defendants Baty and Miller until the eve of trial, when Smith announced that attorney Taylor would be counsel for Baty. Baty and Miller had inconsistent stories creating a conflict for any lawyer attempting to represent them both. The court found, however, that attorney Taylor did not act independently on Baty's behalf, but collaborated with Smith throughout the trial. Decisions on trial tactics were a "joint venture." 661 F.2d at 397. Under those circumstances, the designation of Taylor as "lead counsel" for Baty could not erase the effect of Smith's actual conflict, where Smith continued to represent Baty. Thus here, Doar's association as co-counsel did not "moot" Long's conflict. Unlike attorney Smith in *Baty v. Balkcom*, Long never sought to remove himself as lead counsel for petitioner and Doar, conversely, never purported to assume that role.

that no objection was made to the argument at trial. The fact is, however, that the issue was presented to the trial court on no less than three occasions.[2] That the trial court did not address the issue in its order does not mean that it was not raised.

It is also no answer to state that Long did not object to the solicitor's prejudicial comments or to the questions on direct examination of Moose and Danielson that laid the groundwork for those comments.[3] Petitioner can only be deemed to have waived the objection where his counsel was free to interpose it. But Long, of course, operated under a conflict of interest created by the very fact of his joint representation of petitioner, Moose, and Danielson. Long's failure to object cannot therefore be credited to a tactical decision. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Estelle v. Williams*, 425 U.S. 501 (1976).[4] He was not free to object to the closing argument or questions without favoring one client over another: if he objected, he would undermine a line of questioning intended to bolster the credibility of Moose and Danielson, who were awaiting sentencing by the trial judge. Long chose not to object and thus cleared the way for

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[2] The issue was presented in the Memorandum in Support of Defendant Hoffman's Motion For New Trial (pp. 46-49), at oral argument on the motion for new trial, and in the Motion to Supplement the Record, TR. 1641-1642.

[3] The questions themselves were not objectionable. *See* ¶ 5, *infra*. Even if they were, however, petitioner cannot be deemed to have waived the objection for the reason stated above.

[4] There is a "deliberate by-pass" of an objection only "[i]f counsel is aware of the facts and the law . . . and yet decides not to object because he thinks the objection is unfounded . . . or for any other reason *that flows from his exercise of professional judgment*. . . ." *Wainwright* v. *Sykes*, 433 U.S. at 99 (emphasis added). It goes without saying that the exercise of professional judgment must not be impeded by a conflict of interest.

the jury to infer that if his clients, Moose and Danielson, were telling the truth, his other client, namely petitioner, was not. Long's failure to object, far from providing reason to deny this petition, is further evidence of the conflict which deprived petitioner of his constitutional right to conflict-free counsel.

5. The Brief in Opposition, at 11-14, further misses the point in arguing that no objection was made to the questions put to Moose and Danielson on direct examination by the solicitor. Petitioner does not challenge the evidence admitted through these questions; indeed, the questions in themselves were not objectionable.[5] His challenge is not to the state's evidence but to the solicitor's closing argument that petitioner was not to be believed because he was represented by the same lawyer who was representing petitioner's accusers. Petitioner underscores the questions asked Moose and Danielson about Long and his joint representation of petitioner, not as an independent basis for reversal, but as proof that the closing argument's spotlight on Long's conflict of interest was not extemporaneous and inadvertent but was a stage direction which the solicitor had carefully rehearsed.

6. The Brief in Opposition does not deny that, to elicit a waiver of the right to conflict-free counsel, the court must advise the defendant both that a conflict may well exist and what the specific dangers of conflict-ridden representation are. The Brief in Opposition attempts to gloss over the fact that the trial court did neither, but only noted features common to multiple defendant trials. The trial court did not advise petitioner that Long had a conflict of interest or that petitioner had a right to conflict-free counsel. And it did not advise petitioner of even one respect in which Long's performance might

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[5] The solicitor elicited that Moose and Danielson had been represented by Long when they plea bargained; were still represented by him; and that Long was also petitioner's lawyer.

be affected by a conflict.[6] It spoke rather of how a *joint trial* might affect the defendants (*i.e.*, they might testify against one another), the jury (*i.e.*, it might return different verdicts), and the judge (*i.e.*, he might impose different sentences). In effect, the Brief in Opposition argues that it is enough that the court implicitly recognized some kind of potential conflict and held some kind of hearing, even though proper questions were not asked to elicit a knowing waiver. What the Constitution requires, however, is "*full warning* by the court of the dangers of such representation." *United States v. DeFillipo*, 590 F.2d 1228, 1240 (2d Cir. 1979), *cert. denied*, 442 U.S. 920 (1979), *quoted in* Br. Op. at 28-29 (emphasis added).[7] That fundamental requirement is not met by an imprecise judicial soliloquy which fails even to address, much less elucidate, the critical choices that faced petitioner.

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[6] The Brief in Opposition, at 29, is simply wrong when it states that the court "specifically discussed with the Petitioner the potential conflicts which could arise . . . ." The Brief, at 17-20, sets forth the colloquy between the trial court and petitioner, and the critical term "conflict" is never mentioned. Nor is any possible effect on Long's performance mentioned.

[7] Indeed, in that case, the Court of Appeals for the Second Circuit noted approvingly that the trial judge had specifically advised the defendants "to review the issue with counsel to make sure that 'he won't be representing one better than the other, and [that] the other won't be prejudiced because of the manner in which the defense will be carried out,'" and had also warned that "'[s]ometimes the assumptions of the lawyer will be so framed it will be prejudicial to one. . . .'" 590 F.2d at 1237 n.15.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, the writ should be granted and the judgment reversed.

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